Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1906

MAYOR AND CITY COUNCIL OF BALTIMORE,
Petitioner,

v.

WARREN O. BARGER AND MARION IWANCIO, ET AL,
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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WARREN O. BARGER AND MARION IWANCIO, ET AL,
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, the Mayor and City Council of Baltimore, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding on March 5, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (App. 1a) is reported at ___ F.2d ___. The oral opinion of the District Court denying Petitioner's motion for judgment notwithstanding verdict or, alternatively, a

new trial from jury verdicts rendered against them (R. 21, 32) is set forth in the Appendix, *infra* at p. 8a; it was not reported.

JURISDICTION

The judgment of the Court of Appeals (App. 1a), was entered on March 5, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Can a Jones Act Seaman, whose recovery under the *Jones Act* has been consistently confined to pecuniary loss, undermine the clear legislative intent of the Act and recover non-pecuniary damages by joining a claim for unseaworthiness under the general maritime law with his *Jones Act* claim for negligence?

2. Do the provisions of an OSHA regulation create a standard of care or seaworthiness applicable to a shipowner in an action under the *Jones Act* or general maritime law, in spite of the inadmissibility of the OSHA regulation itself?

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

46 U.S.C. § 688 "The Jones Act."

§ 688. Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the

right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007.

STATEMENT OF THE CASE

This case originated upon the filing of complaints in the United States District Court for the District of Maryland by Warren Barger and Marion Iwancio seeking damages for hearing loss allegedly sustained while working as marine engineers aboard fireboats operated and owned by the Petitioners[1] (R. 14, 22). The complaints were premised upon 46 U.S.C. § 688 (the *"Jones Act"*) and the doctrine of unseaworthiness under general maritime law.

The cases were consolidated and tried before a jury. The plaintiffs' expert witness gave testimony concerning the applicability and specifications of certain regulations promulgated by the *Occupational Safety and Health Act, 29 C.F.R. Chapter XVI*, (hereinafter "OSHA") regarding limits upon noise exposure applicable to certain employers (R. 174, 175). Over initial objection (R. 174). the District Judge took judicial notice of the regulations, allowed testimony regarding OSHA standards, and with agreement of counsel, instructed the jury that violation of those OSHA standards constituted negligence *per se* under the *Jones Act* and rendered the vessels in question unseaworthy (R. 314, 315, App. 3a, 13a).

At trial, the plaintiffs' economic expert testified to the pecuniary damages sustained by them, and each plaintiff and others testified to damages relating to pain and

[1] References are to the pages of the printed record before the Court of Appeals.

suffering (R. 226, 232). The District Judge instructed the jury that it was to consider the plaintiffs' physical pain, mental suffering, discomfort, embarrassment, anguish, humiliation, and the diminution in their capacity to enjoy life for the past and future in addition to pecuniary loss (R. 319). The jury found against the Petitioner on the issues of liability under the *Jones Act* and general maritime law, and returned general verdicts in favor of Iwancio in the amount of $125,000 reduced by ten percent contributory negligence, and in favor of Barger in the amount of $170,000 reduced by ten percent contributory negligence, yielding $112,500 for Iwancio and $153,000 for Barger (R. 332-3).

The Petitioner filed a Motion for New Trial (R. 33) in which it raised the issues of excessiveness of the verdicts and requested a new trial because of the prejudicial effect of the introduction of the OSHA regulations and the subsequent jury instruction on them. The District Judge denied the motion and rendered a bench opinion (App. 9a), whereafter the Petitioner filed a timely appeal with the United States Court of Appeals for the Fourth Circuit.

The Court of Appeals ruled that the OSHA regulations do not apply to *Jones Act* seamen, and therefore the jury instruction regarding a violation of the *Jones Act* as constituting negligence *per se* was erroneously given. The plaintiffs were not saved by Maryland's adoption of OSHA regulations under state law. Md. Ann. Code Art. 89, § 31(1). Nonetheless, the Court of Appeals refused to reverse the jury's verdict because the OSHA regulation "only embodies a standard of care which might be applied to the (Petitioner) even in the absence of the regulation," and was not in force throughout the plaintiffs' employ (App. 8a).

The Court of Appeals refused to remand the case with respect to the allowance of non-pecuniary damages, find-

ing the Petitioner's argument on that point "totally inapposite." The Court did not find the verdicts excessive, nor did it find that the District Judge abused his discretion in refusing to reduce the damages awarded against the Petitioner. In all respects, the decision of the District Court was affirmed (App. 7a-8a).

REASONS FOR GRANTING THE WRIT

1. This case presents a novel question regarding the scope of allowable damages when a cause of action for negligence under the *Jones Act*, 46 U.S.C. § 688, is joined with a claim of unseaworthiness under general maritime law. Although subject to some question and confusion it is arguable that nonpecuniary damages could be recovered for injuries resulting from unseaworthiness. *Accord, Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974). In contrast the case law is uniform in holding that recovery under the *Jones Act* is wholly limited to pecuniary damages. *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524, 526 (5th Cir. *en banc* 1979) (see footnote 5 for an exhaustive list of cases holding to this proposition as well). This petition presents a unique problem: can the statutory and case law limitation on recoverable damages under the *Jones Act* be expanded beyond its intended scope by combining a *Jones Act* claim with a general maritime claim? The Petitioner contends that it cannot. The case law in support of this proposition is somewhat unclear and inconsistent among the various circuits. Much of the inconsistency stems from the varying interpretations as to the holdings and scope of a triad of decisions rendered by this Honorable Court: *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970) (hereinafter "Moragne"); *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974) (hereinafter "Gaudet"); *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618 (1978) (hereinafter "Mobile Oil"). In keeping with this Court's express concern for uniformity in this general area, *Moragne*, 398 U.S. at 404-405, Petitioner respectfully

requests that this Court grant its Petition for Certiorari and correct what Petitioner contends was a wrong decision below and settle the present uncertainty and apparent conflict among the circuits on this damages question. The uncertainty and conflict can best be evidenced by looking at two recent cases in this area and contrasting the decision in the circuit court below.

Ivy v. Security Barge Lines, Inc., 606 F.2d 524 (5th Cir. *en banc* 1979) became the most recent addition to the *Jones Act* jurisprudence denying recovery for nonpecuniary loss and limiting recovery to pecuniary loss. The Fifth Circuit considered both the *Moragne* and *Gaudet* decisions and found them inapposite to the question presented because neither involved a *Jones Act* seaman and each dealt solely with an unseaworthiness claim asserted under general maritime law. A majority of the court rejected the view embodied in a strongly worded dissent that *Moragne* and *Gaudet* presented an expansive approach to recovery of nonpecuniary damages rooted in the recognized humane and liberal character of proceedings in admiralty and that those decisions should be applied to the *Jones Act*. Though *Ivy* initially involved a suit under the *Jones Act* and the general maritime law, the plaintiff below recovered solely for negligence and so the general maritime law claim was not before the court on appeal because there was no finding of unseaworthiness. *Ivy*, 606 F.2d at 528. Thus, *Ivy* left unresolved the question of whether the scope of recoverable damages otherwise limited to pecuniary damages under the *Jones Act* can be expanded by joining a general maritime law claim.

The First Circuit Court of Appeals went one step further in *Do Carmo v. F. V. Pilgrim I. Corp.*, No. 79-1115 (1st Cir. filed December 28, 1979) (App. 18a). In *Do Carmo*, a five count complaint was framed in terms of the *Jones Act*, Death on the High Seas Act (DOHSA), 46 U.S.C. § 761 *et seq.*, and general admiralty and maritime law. At trial

liability was founded upon both "Jones Act negligence" and general maritime law unseaworthiness. The district court gave a jury instruction limiting damages to those of a pecuniary nature only. The issue for resolution on appeal was whether damages for loss of society are properly recoverable under the Jones Act in an action brought by the survivors of a seaman killed on the high seas. Despite a finding below of unseaworthiness under the general maritime claim the court held that in an action for wrongful death on the high seas *premised on the Jones Act*, the deceased seaman's survivors are limited to recovering damages of a pecuniary nature. It is essential to stress that the court in *Do Carmo* was interpreting the scope of recoverable damages under the Jones Act and not DOHSA. Accordingly, the court held there was no error in the District Court's jury instructions limiting recoverable damages to those of a pecuniary nature. See p. 4 of the decision.

The Fourth Circuit in the case at bar rejected your Petitioner's contention that plaintiffs Iwancio and Barger were prevented from recovering anything but pecuniary damages. *Barger and Iwancio v. Mayor and City Council of Baltimore,* No. 79-1226 (4th Cir. March 5, 1980). Petitioner did not have the benefit of a limiting instruction regarding damages such as that given in *Do Carmo;* rather, the District Court instructed the jury that they could consider pecuniary as well as nonpecuniary elements of damages. On the scope of allowable damages the Honorable Herbert F. Murray, Judge of the U.S. District Court for the District of Maryland, instructed that:

> You are to consider the physical pain and mental suffering and the discomfort which they have endured in the past by reason of these injuries. You are to consider the physical pain and mental discomfort to which they may be subjected in the future. You are to consider the embarrassment, anguish and humiliation to which the plaintiffs have been subjected and may

> be subjected in the future as a result of any hearing loss. You are to consider the extent to which the plaintiffs' capacity for enjoyment of life has been damaged and is likely to be damaged in the future.
>
> After consideration of all of these elements of damage, you should award such sum of money as will adequately, fairly and fully compensate the plaintiffs for all of their injuries, losses, and damages.

The jury awarded Plaintiff Iwancio $112,500 in damages, $74,836 of which was pecuniary based on the Plaintiff's economic expert: plaintiff Barger received $153,000 in damages, $100,697 of which was pecuniary. The district court denied the Petitioner's request to overturn the jury awards.

The apparent reason for the rejection of Petitioner's arguments regarding this issue on appeal was a finding that the Supreme Court decision in *Mobil Oil* was "totally inapposite" to this case because it was based on the restrictive language of DOHSA. The court's cursory footnote treatment and rejection of Petitioner's contentions reflects a limited understanding of the thrust of *Mobil Oil* and a failure to consider other persuasive authority presented at oral argument such as *Ivy* and *Do Carmo*.

Initially, *Mobil Oil* is not totally inapposite to this case. The Plaintiffs' right to recovery in *Mobil Oil* was based on the *Jones Act* because recovery was premised solely upon negligence. In *Mobil Oil* a suit was brought by several claimants seeking recovery for the deaths of their husbands in a helicopter crash outside United States waters. One of the passengers was found by the District court to be a *Jones Act* seaman and his widow was allowed to sue under the *Jones Act, DOSHA* and general maritime law. On appeal, one of these two passengers was also found to be a *Jones Act* seaman and his widow's claims were remanded to the district court for a determination of damages under the *Jones Act. Mobile Oil v. Higginbotham,*

545 F.2d 422, 433 (5th Cir. *en banc* 1977). Thus, while the *Jones Act* was not discussed in the Supreme Court's Opinion, it was raised squarely by the facts and urged on application for rehearing. See *Ivy*, 606 F.2d at 528. Additionally, the *Jones Act* applies in equal force to the death of seamen on the high seas, e.g. *Antypas v. Cia Maritime San Basilio, S.A.*, 541 F.2d 307 (2nd Cir. 1976), *cert. denied*, 429 U.S. 1098 (1977). The Fourth Circuit was incorrect in finding *Mobil Oil* — where damages were limited to pecuniary loss only — "totally inapposite" to the case at bar.

The Fourth Circuit also erred in failing to consider the *Ivy* and *Do Carmo* decisions. *Ivy* impliedly, and *Do Carmo*, expressly, support the Petitioner's contention that the plaintiffs in this case should have had their recovery limited to pecuniary loss. The clear legislative intent of the *Jones Act* as found in numerous cases is to limit *Jones Act* recovery to pecuniary loss. Congress did not limit *Jones Act* plaintiffs to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements. Compare *Mobile Oil*, 436 U.S. at 625. The Petitioner seeks review in this Court because the law relative to this issue is conflicting and uncertain and the Petitioner has been aggrieved by an incorrect ruling.

2. In addition, the case presents questions regarding the applicability of federal safety regulations to seamen's claims under the *Jones Act*. Over objection, the District Court took judicial notice of certain of the *Occupational Safety and Health Act, 29 C.F.R. Chapter XVII*, regulations regarding noise exposure, and allowed testimony concerning the amount of noise exposure sustained by the plaintiffs in relation to OSHA standards. After the close of testimony, the District Court read the regulation and instructed the jury that:

> This regulation establishes a standard of care in the very area we are concerned with here. Its requirements are binding in law. If you find there was a violation of the requirements of this regulation, this would constitute negligence on the part of the Mayor and City Council of Baltimore as owners of the fireboats in question. It would entitle the Plaintiffs to recover under the *Jones Act* if such negligence was the proximate cause of Plaintiffs' hearing loss.

In the matter of unseaworthiness, the District Court instructed that:

> In the area covered by that (OSHA) regulation, I instruct you that a violation of its terms would render the ship unseaworthy and if such unseaworthiness was the proximate cause of harm to the plaintiffs, it would render the shipowner liable.

The Circuit Court below agreed with the Petitioner in its assertion that the above instructions were erroneously given. That court followed the lead of *National Marine Service, Inc. v. Gulf Oil Co.*, 433 F. Supp. 913, (E.D. La. 1977), *aff'd*, 608 I .2d 522 (5th Cir. 1979) (hereinafter "National Marine Services") and *Clary v. Ocean Drilling and Exploration Co.*, 429 F. Supp. 905 (E.D. La. 1977), *aff'd*, No. 77-1984) (5th Cir., filed Jan. 15, 1980 (hereinafter "Clary"), and ruled that because OSHA regulations did not apply to the working conditions of the plaintiffs, the District Judge erred when he included a negligence *per se* instruction based upon the OSHA noise regulation.

The Fourth Circuit found that the Petitioner expressly agreed to the District Judge's proposed instructions prior to presentation to the jury, and although erroneous, the District Court's charge did not result in a miscarriage of justice sufficient to relieve the Petitioner from the provisions of Fed. R. Civ. P. 51.

The Petitioner asserts that in the instant case the Fourth Circuit created a conflict among the jurisdictions

by not remanding this case to the District Court for a new trial. In its opinion, *Barger and Iwancio v. Mayor and City Council of Baltimore, supra* at page 8, the Court reasons that the OSHA regulations consist largely of a restatement of industry practice regarding covered employees, and specifies what should be done regarding the conservation and protection of the hearing faculties of covered employees. Although the Court of Appeals explicitly supported the Petitioner's assertion that the plaintiffs herein are simply not employees covered by the OSHA regulations, the appellate Court relieved the Petitioner only of the form but not the substance of the OSHA regulations.

It is most assuredly the substance of the law which creates a duty on the part of a shipowner answering a suit for damages under the *Jones Act*. The District Court in *National Marine Services, supra*, held that since the Coast Guard retains authority to the exclusion of OSHA to regulate the safe working conditions of "seamen," the OSHA standards do not create a duty on the part of the shipowner towards seamen. If there is no duty, then there can be no breach of a duty, and hence recovery cannot be had under the *Jones Act* by merely showing that the shipowner violated an OSHA regulation.

In *Clary, supra* at 908, the District Court noted that 29 U.S.C. § 653(b)(g) provides that nothing in the OSHA act shall be construed to affect in any manner the common law or statutory rights, duties or liabilities of employers. The Court could not conceive that the intent of Congress or the Secretary of Labor to impose almost absolute liability on shipowners under the *Jones Act* and general maritime law.

In the instant case, the Court of Appeals said that it was not a miscarriage of justice for the jury to consider the terms of the OSHA regulations as a standard of care due

and owing *Jones Act* seamen, notwithstanding its holding that the OSHA regulations do not apply to these employees. This decision is in conflict with the holdings of the United States Court of Appeals for the Fifth Circuit in *National Marine Services, supra,* and *Clary, supra.* In those two cases, the Fifth Circuit strongly suggests that the terms of OSHA regulations simply have no application whatsoever to *Jones Act* seamen because by the plain language of 29 U.S.C. § 653(b)(1), Congress has excluded application of OSHA regulations to "employees with respect to which other federal gencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." As in *National Marine Services, supra,* and *Clary, supra,* in the instant case the Coast Guard has jurisdiction over the safety and health of seamen. However, no applicable regulation or other credible evidence was before the jury, and the OSHA regulations which were before the jury did not create either a standard of care due and owing the plaintiffs or a standard of seaworthiness by which the Petitioner's vessels could be judged. In view of the Fifth Circuit's holdings cited above, the jury was therefore presented with evidence totally irrelevant to the legal questions it had to answer, and was improperly instructed with regard to the application of such evidence. The absence of legally sufficient evidence and proper legal instructions rendered the jury verdicts miscarriages of justice sufficient to warrant reversal. *Esso Standard Oil S.A. v. S.S. Gasbras Sul,* 387 F.2d 573 (2nd Cir. 1967) *cert. denied,* 391 U.S. 914 (1968). Even if the verdict could have been supported by the general maritime action, since the jury returned general verdicts, it was error for the Fourth Circuit not to vacate the judgment and remand the case for further proceedings. *Simko v. C and C Marine Maintenance Co.,* 594 F.2d 960 (3rd Cir. 1969).

In the alternative, the Court of Appeals below vastly expanded the duties of a shipowner towards seamen. Such an expansion would be in conflict with the Fifth Circuit's holdings on the same point, and ultimately in contravention of the intent of Congress in formulating the OSH Act. The Petitioner seeks review in this Court because of conflicting decisions of the appellate Courts, and because the Petitioner has been aggrieved by an incorrect ruling.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

United States Court of Appeals
For The Fourth Circuit

No. 79-1226

Warren Barger and Marion Iwancio,

Appellees,

v.

Mayor & City Council of Baltimore,
a municipal corporation,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Herbert F. Murray, District Judge.

Argued February 6, 1980 *Decided March 5, 1980*

Before WINTER and PHILLIPS, Circuit Judges, and HOWARD, District Judge.*

William Hughes, Associate City Solicitor (Benjamin L. Brown, City Solicitor, J. Warren Eberhardt, Assistant City Solicitor, L. William Gawlik, Assistant City Solicitor on

* Honorable Joseph C. Howard, United States District Judge for the District of Maryland, sitting by designation.

brief) for Appellant; Paul D. Bekman (William H. Engelman, Kaplan, Heyman, Greenberg, Engelman & Belgrad, P.A. on brief) for Appellees.

WINTER, Circuit Judge:

Baltimore City appeals from judgments entered against it in two consolidated actions by former marine employees for damages for loss of hearing brought under the Jones Act and general admiralty law. We affirm.

I.

Plaintiffs, Warren Barger and Marion Iwancio, are former members of the fire department of the City of Baltimore. Before they retired, Barger and Iwancio worked in the Marine Division of the department as crew members of the city's fireboats. By the early 1970's, these firemen began to suffer from hearing loss. Their hearing difficulties stemmed from prolonged exposure to the loud noise emitted by the engines of the diesel fireboats, which had replaced the city's steam-powered fireboats around 1960. Because of their hearing impairments, the two firemen retired, Barger in 1975 and Iwancio in 1977, and they received special disability pensions from the city.

Subsequently, Barger and Iwancio brought this suit under the Jones Act, 42 U.S.C. § 688, and general maritime law to recover damages for their loss of hearing, based upon the city's alleged negligence in the operation of the fireboats with the noisy engines. The jury found that the city had been negligent and ruled in favor of the firemen both under the Jones Act and general maritime law. Barger was awarded $153,000 and Iwancio received $112,500.

II.

The city challenges these awards principally on the basis of the district judge's instructions concerning negligence per se.[1] In his charge to the jury concerning both the Jones Act and general maritime law, the district judge instructed the jury that the city had been subject to the regulations of the Occupational Safety and Health Administration (OSHA) since 1971 and that if the city failed to comply with the OSHA noise regulation in the operation of its fireboats, it would be guilty of negligence per se. At trial, an expert described the supposedly applicable OSHA noise regulation to the jury and testified that the city had failed to observe the requirements of that regulation.

The city objects to the negligence per se instruction mainly in two respects. First, the city correctly points out that the city of Baltimore became subject to OSHA regulations only in 1973, not as early as 1971 as the trial judge instructed.[2] While the trial judge did misstate the date upon which OSHA regulations began to apply to the city, this two year discrepancy is of minor significance. In

[1] Preliminarily, the city suggests that the Jones Act does not permit recovery for occupational diseases, in this instance a loss of hearing. The city is clearly mistaken, since the Jones Act incorporates the remedies provided under the FELA, *see* 46 U.S.C. § 688, and since there is no doubt that a worker may recover under the FELA for occupational diseases. *See* Urie v. Thompson, 337 U.S. 63 (1949); *see also* Young v. Clinchfield Railroad Company, 288 F.2d 499 (4 Cir. 1961). The city cites only one case to the contrary, Dalton v. American President Lines, 339 F. Supp. 821 (N.D. Calif. 1972), in which the court stated that hearing loss was an occupational disease which was not compensible under the Jones Act. In light of *Urie*, this statement in *Dalton* cannot be considered authoritative.

[2] The OSHA regulations themselves do not include political subdivisions of states, such as the city of Baltimore, within the definition of employer. 29 C.F.R. § 1910.2(c). When Maryland assumed responsibility for administering the OSHA regulations within its borders, it broadened the definition of employer to include state, municipal, and county governments. Md. Ann. Code, Art. 89, § 29(b). The Maryland statute did not become effective until 1973; therefore, prior to 1973, the OSHA regulations did not apply to the City of Baltimore.

this respect, the gist of the trial judge's instruction was that the city's actions could be measured against the OSHA noise regulation for a few years prior to the firemen's retirement in 1975 and 1977; whether the regulation began to govern the city's conduct in 1973 or two years earlier in 1971 was relatively inconsequential. Therefore, this error of the trial judge was harmless.

Second, and more importantly, the city insists that the OSHA noise regulation does not apply to the working conditions of Jones Act seamen and that therefore the trial judge committed error by including any negligence per se instruction based upon the OSHA noise standards. The OSHA regulations, most of which have been incorporated by reference into Maryland law by the Maryland Commissioner of Labor and Industry,[3] specifically refrain from addressing the working conditions of Jones Act seamen. In 29 C.F.R. § 1910.5(b), the Labor Department placed outside the reach of the regulations employees whose occupational safety and health are within the statutory jurisdiction of other federal agencies. The Coast Guard is empowered to lay down health and safety rules for Jones Act seamen, and the courts have recognized that the OSHA regulations thus do not apply to this category of employees. *See* National Marine Service, Inc. v. Gulf Oil Co., 433 F. Supp. 913, (E.D. La. 1977), *aff'd.*, 608 F.2d 522 (5 Cir. 1979); Clay v. Ocean Drilling & Exploration Co., 429 F. Supp. 905 (E.D. La. 1977).[4]

In response, the firemen rest upon the broad language of the Maryland statute, establishing the state machinery to administer the federal OSHA regulations, which defines "employee" as "an employee of an employer who is employed for wages, salaries or commissions in the business, trade, commerce or industrial activity of his

[3] See 38 Fed. Reg. 17834-17838; Md. Ann. Code, Art. 89, § 31(1).

[4] Moreover, the draftsmen of the OSHA regulations confirmed the intent of 29 C.F.R. § 1910.5 when they omitted crew members from the scope of the OSHA longshoremen regulations. 29 C.F.R. § 1918.1.

employer [including] employees of the State, county, city, and municipal governments . . ." Md. Ann. Code, Art. 89, § 29(c). The firemen contend that, through this all-inclusive language, Maryland has extended the protections of OSHA to Jones Act seamen even if the federal OSHA regulations themselves do not.

Nowhere, however, has Maryland evinced an express intent to include Jones Act seamen within the protections of the OSHA regulations. Maryland has enacted no regulations aimed at crew members to supplement federal OSHA regulations. Rather, Maryland incorporated into its law the relevant portions of the federal OSHA regulations as a whole, including the explicit exclusion of workers under the jurisdiction of federal agencies other than the Labor Department. Because § 29(c) does not purport to reach employees, such as Jones Act seamen, who are subject to the jurisdiction of federal agencies besides the Labor Department, it is unlikely that the general language of the Maryland statute was intended to discard this express exclusion contained in the OSHA regulations which Maryland adopted. Fairly read, § 29(c) is a provision designed to confirm the broad scope of application of the health and safety standards, but not designed to alter the exclusion directed explicitly at employees such as Jones Act seamen.

Thus, because the OSHA noise regulation did not apply to the working conditions of these firemen, who were Jones Act seamen, the district judge erred when he included a negligence per se instruction based upon the OSHA noise regulation. The city, however, cannot obtain a reversal of the jury's verdict based upon this error. When the district judge presented the city with his proposed instructions, the city made no objection based upon the inapplicability of the OSHA noise regulation to Jones Act seamen. In fact, the city expressly agreed to the district judge's proposed instructions before he presented them to the jury. Therefore, the literal terms of Fed. R. Civ. P. 51 prevent the city from raising this objection on appeal when it failed to present its objection to the district court.

Of course we will permit appellants to avoid the strictures of Rule 51 even if they lodged no objection at trial, if the error of the trial judge resulted in a "miscarriage of justice." *See, e.g.*, United States v. Board of Education of Mineral County, 253 F.2d 760, 765 (4 Cir. 1958). For several reasons, justice will not be disserved by allowing the verdicts in this case to remain undisturbed.

First, the OSHA regulations at issue in this case was largely a restatement of industry practice regarding employee exposure to noise. The regulation sets out noise levels which are dangerous, requires that employers take steps to reduce the noise or provide employees with personal protective devices, and mandates the establishment of hearing conservation programs. 29 C.F.R. § 1910.95. At trial, an expert testified that it had long been recognized in industry that *prolonged* exposure to loud noise could cause hearing loss, that employers normally provided protective devices to workers exposed to loud noises, and that industries plagued with noise problems frequently instituted hearing conservation programs. Thus, the regulation only embodies a standard of care which might be applied to the city even in the absence of the regulation.

In addition, under the district judge's instruction, the jury applied the regulation to the city only during the period beginning in 1971, a small part of the time that the firemen worked on the fireboats. Since the diesel boats came into use around 1960 and since the firemen retired in the mid-1970's, the period during which the regulation was not applied by the jury was about twice as long as the period during which the jury would have compared the city's conduct to the standard contained in the noise regulation.

Finally, both firemen sought medical treatment for their loss of hearing soon after 1971. Barger consulted a physician in 1972 and Iwancio secured medical treatment for his hearing problems in 1975. Therefore, there was

convincing evidence that their loss of hearing had been caused by noise exposure that took place over a long period prior to 1971, the effective date of the regulation according to the district judge.[5]

In sum, there was strong evidence that the plaintiffs' injury was sustained prior to 1971, the noise regulation was applied by the jury for only a small part of the period during which the firemen were exposed to the loud noise, and the noise regulation itself was merely a codification of industry practices, practices by which the city could fairly be judged. Consequently, because failure to correct the trial judge's error will not result in a miscarriage of justice, *see* Harkins v. Ford Motor Co., 437 F.2d 276 (3 Cir. 1970), we decline to notice the erroneous negligence per se instruction as "plain error".

III.

Finally, the city contends that the jury's verdicts were excessive.[6] Barger recovered $153,000 and Iwancio was awarded $112,500. At trial, it was shown that their wage losses alone, deducting the pensions they would receive from the city, amounted to almost $101,000 for Barger and almost $75,000 for Iwancio. Considering the additional emotional and physical injury that results from a loss of hearing, we do not think that the jury's verdicts can be

[5] As well, the district judge included in his charge negligence instructions other than the negligence per se instruction, instructions which provided the jury with a means to find negligence based on the city's failure to take preventive measures commonly instituted by other employers.

[6] In a related vein, the city argues that the firemen realized double recovery, apparently because they will receive disability pensions in addition to their damage awards. However, the district judge directed the jury to subtract the amount of the firemen's pensions from their total wage losses in calculating the firemen's damages. In addition, the proof of wage losses presented by the plaintiffs included a deduction of the pensions from the total wage losses to reach a net loss figure. Thus, the jury was adequately instructed not to award a double recovery, and the proof at trial was presented in a manner that would not lead the jury to overlook the firemen's pensions.

considered excessive.[7] Certainly, the district judge did not abuse his discretion when he refused to overturn the jury's awards. *See* West v. Richmond, Fredericksburg & Potomac Railroad, 528 F.2d 290 (4 Cir. 1975).

Affirmed.

In The United States District Court
For The District of Maryland

Cases No. HM 75-523,
HM 76-403

Warren Barger and Marion Iwancio

vs.

Mayor and City Council of Baltimore

The above-entitled matter came on for hearing of motions before the honorable Herbert F. Murray at 4:00 P.M.

Baltimore, Maryland
January 31, 1979

Appearances

On behalf of the Plaintiffs: William H. Engelman, Esquire, Paul D. Bekman, Esquire.

[7] At oral argument, the city attempted to argue that Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978), prevented the firemen from recovering damages for emotional and physical injuries, beyond their calculable loss of wages. In that decision, the Supreme Court held that a wrongful death plaintiff could not recover damages for loss of society under the Death on the High Seas Act, 46 U.S.C. §§ 761 *et seq.*, which limits damages to compensation for "pecuniary loss." That ruling is totally inapposite to this case, because it was based on the restrictive language of the Death on the High Seas Act.

On behalf of the Defendants: Warren Eberhardt, Esquire, James L. Prichard, Esquire, L. William Gawlik, Esquire.

(T. 2) BENCH OPINION

(The Court) Well, I would like to decide the matter today, after hearing the Arguments, and I want to read a bench opinion in connection with it.

The Plaintiffs Warren Barger and Marion Iwancio brought suit in this court against their former employer, the Mayor and City Council of Baltimore, for bearing loss allegedly sustained as a result of exposure to engine room noise while working on board defendant's fireboats.

Plaintiffs further alleged that Defendants were liable under the Jones Act, 46 U.S.C. Section 688, and the General Admiralty Law, thus invoking the admiralty jurisdiction of the court.

The cases were consolidated and tried to a jury between October 23rd, 1978, and October 31st, 1978. The jury returned verdicts in favor of Plaintiff Barger in the amount of $153,000 and in favor of Plaintiff Iwancio in the amount of $112,500.

Defendants have subsequently moved the Court for a new trial or for Judgment notwithstanding the verdict. Argument has been heard on Defendant's Motion this afternoon. The court will discuss each of Defendant's four grounds separately in the remainder of this bench opinion.

First the double recovery theory. Defendant's first (T. 3) contention is that they are entitled to a reduction of either the amounts of the verdicts, the amounts of retirement benefits paid, or a new trial on damages. Defendants are apparently contending that Plaintiffs have been compensated twice for the same losses. For the reasons stated in the remainder of this section of the opinion, the court believes this view erroneous and denies the requested relief on this ground.

Defendants recognize at the outset of their motion that plaintiffs are allowed to pursue both Jones Act claims and alternative compensation, such as the disability pension payments sought and received by the Plaintiffs. That is indicated by the statement on page 6 of the Defendant's memorandum where they say that the city admits that under the holding of the Supreme Court of the United States in *Read v. The Steamship Yaka,* 373 U.S. 410, 1963, because of the uniqueness and liberal interpretation of maritime law, the injured Plaintiffs in this case are not held to the single and exclusive remedy of the Workmen's Compensation Law or the special disability retirement, the City of Baltimore's better provision.

The rationale of the *Read v. Yaka* decision and also *Biggs v. Norfolk Dredging Company,* 360 F.2d 360 (4th Cir. 1976), is that injured employees should be allowed to seek quick benefits through appropriate compensation programs while (T. 4) awaiting final resolution of their tort claims. It is true as Defendants argue that the *Biggs* decision held that an employer should not be required to doubly compensate an injured employee for the same injury. That Court therefore provided that the verdict could be reduced by amounts already paid through workmen's compensation programs.

The Court feels that the instant case is distinguishable, however, in that the jury was fully informed of the amount of the disability benefits paid and to be paid in the future to Plaintiffs. The jury was specifically instructed by the Court that it was to deduct these amounts when determining economic loss to Plaintiffs. The Court stated, "the fact that the Plaintiffs are receiving a disability pension does not defeat their right to recover damages for loss of wages. In such a case, their loss of wages would be measured by the difference between what you find the Plaintiffs would have earned in the future, discounted to present value, had they not seen disabled, and the disability pension on the other. In other words, you consider the difference between those sums." Instruction transcript page 24 lines 7 to 13, October 31, 1978.

The jury was instructed, therefore, that their verdict was not to include already compensated loss of earnings. Therefore, there is no double recovery of the type sought to be prevented by the court in *Biggs*.

(T. 5) Second is the OSHA regulation argument of the Defendants. Here Defendant urges that it was error for the Court to allow Plaintiffs' expert to testify with regard to Occupational Safety and Health Administration Regulation 1910.98 and to later instruct the jury that violation of its provisions may constitute negligence or render a vessel unseaworthy. Defendants base their objections on the inapplicability of such regulations either to seamen working aboard vessels or to municipal employees.

After examing the cases and rules cited by the defendant, the Court must conclude that even if error could be posited on its instructions with regard to that regulation, which the Court does not admit, it was certainly not erroneous to allow the testimony of Mr. Van Namee, the plaintiffs' expert. Furthermore, for the reasons stated herein, the Court feels any error in instructing on the OSHA regulation, if such was found, is at the most harmless error. The regulation in question contained at 29 Code of Federal Regulations 1910.98 establishes safe noise standards. The uncontroverted testimony of plaintiffs' expert established that plaintiffs were subjected to noise levels well in excess of those deemed safe by OSHA in promulgating this regulation. The testimony of Mr. Van Namee supported the inference that this regulation was applicable to the fireboats from the time of promulgation. The evidence would also support an inference (T. 6) that the regulation was promulgated in or about 1971.

The section provides that — this is 1910.5 (B) — "None of the standards in this part shall apply to working conditions of employees with respect to which federal agencies other than the Department of Labor or State agencies exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health. The Occupational Safety and Health

Review Commission and two district courts in the fifth circuit have held that the Coast Guard retains the authority to make these kinds of regulations for vessels on navigable waters. *National Marine Service v. Gulf Oil Company*, 433 F. Supp. 913, (E.D. La. 1977) and review commission decisions cited therein; *Clary v. Ocean Drilling and Exploration Company*, 429 F. Supp. 905 (W.D. La. 1977). An administrative law judge did hold in his decision of September 29, 1972, OSHRC Docket Number 589, Employment Safety and Health Guide paragraph 15,239, that there was concurrent authority between OSHA and the Coast Guard where the vessel is in harbor. Because of the Court's decision on the remaining questions regarding this regulation, it is not felt to be necessary to harmonize these rulings at this juncture.

Defendants also note that 29 U.S.C. Section 652 excludes municipalities from the coverage of the OSHA regulations. For purposes of the enabling legislation, employer is defined to be "A person engaged in a business (T. 7) affecting commerce who has employees but does not include any state or a political subdivision of a state." The Court thinks it clear that this language excludes the City of Baltimore from the coverage of the act. Plaintiffs argue that notwithstanding defendant's arguments, there was no error on the part of the Court because the regulation was also adopted by the State of Maryland and that that Act specifically applies to municipalities. Maryland Code, Article 89, Sections 29 (B) and (C) define employer and employee in a manner that clearly includes plaintiffs within the coverage of the Maryland Act.

Section 31 of the same article gives the MOSHA Advisory Board the power to promulgate rules and regulations relating to health standards. Pursuant to such authority, MOSHA adopted all Federal OSHA Regulations in existence as of February 2, 1973 and made them effective in the State of Maryland as of March the 8th, 1973. See 38 Federal Register 17,834 to 17,838. Thus, the

regulation was applicable to the city as of March 8th, 1973. This is of course more than a year later than the federal regulation was in effect.

In instructing the jury with regard to the regulation as it related to the Jones Act Claim, the Court read the regulation and then stated, "This regulation establishes a standard of care in the very area we are concerned with here. Its requirements are binding in law. If (T. 8) you find there was a violation of the requirements of this regulation, this would constitute negligence on the part of the Mayor and City Council of Baltimore as owners of the fireboats in question. It would entitle the plaintiffs to recover under the Jones Act if such negligence was the proximate cause of plaintiffs' hearing loss. It should be pointed out that the OSHA Regulation was not in force over the whole period the plaintiffs served on defendant's fireboats. plaintiffs' noise expert indicated, according to the Court's recollection, that the regulation took effect in approximately 1971. That is a matter for you to determine from your recollection of the evidence and the testimony."

With regard to the unseaworthiness claim, the Court stated, "In the area covered by that regulation, I instruct you that a violation of its terms would render the ship unseaworthy and if such unseaworthiness was the proximate cause of harm to the plaintiffs, it would render the shipowner liable."

It would appear, therefore, that Defendants were prejudiced in regard to both the Jones Act and the unseaworthiness claims to the extent that the jury relied on the OSHA Regulation as establishing liability for the period between the adoption of the regulation by OSHA and subsequent adoption by Maryland in March of 1973. Other than that, introduction of evidence and the subsequent instructions about (T. 9) the regulation were correct since the regulation as adopted by the State of Maryland and applicable to the City of Baltimore was relevant to this case. It is, of course, difficult for the Court to guage the

impact of the challenged instructions on the jury. It is, however, uncontested that the testimony and the instructions suggest that the OSHA Regulation was not in effect from 1956 to 1971 and that from 1971 on there were noise suppressors available for the use of plaintiffs. It is reasonable to infer, therefore, that the jury concluded that much of the damage to plaintiffs' hearing occurred before the time that the testimony suggested the regulation was in effect. Notwithstanding this, the jury found liability on both the Jones Act and the unseaworthiness grounds. This strongly suggests that the jury found negligence under at least one of the four alternative theories of Jones Act negligence, or one of the two alternative theories of unseaworthiness.

Furthermore, there was testimony from Mr. Van Namee that notwithstanding the regulations, defendant's failure to test noise levels and to take protective measures was not in accord with *Good Industry Practice*.

The Court also notes that after the Court instructed the jury, it asked counsel whether there were any objections to the charge. Defendants objected only with regard to grounds raised in the fourth part of this motion. The Court had modified its instruction with regard to the OSHA (T. 10) regulation to indicate that the jury should consider the fact that it was not in effect during much of the period that plaintiffs worked in the engine rooms of the fireboats. Federal Rule of Civil Procedure 51 requires that no party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. It is clear from the rule that the purpose of it is so that the court be given an opportunity to correct instruction problems prior to the jury's beginning its deliberations. The Court can only conclude that defendant's objections to the earlier proposed instruction were disposed of by the Court's limiting of that instruction. Accordingly, for all of the discussed reasons the court declines to grant the requested relief on defendant's second ground.

Three, reasonableness of the award. Defendants contend that the amounts awarded plaintiffs were excessive because they included amounts for loss of enjoyment of hearing and because defendants contend there was no proof that plaintiffs could not work as marine engineers. The Court finds both of these arguments without merit. The standard in the Fourth Circuit for over turning a verdict of a jury on the grounds of excessiveness of award is set out in *West V. Richmond, Fredericksburg and Potomac Railroad Company,* 528 (T. 11) F.2d 290 (4th Cir. 1975). The Court there stated that a verdict should be set aside if "It is against the clear weight of the evidence or would result in a miscarriage of justice." At Page 291 of 528 F.2d.

The only evidence presented with regard to damages was presented by witnesses for the plaintiffs except to the extent that defendants established that aplintiffs are receiving disability benefits. Plaintiffs and their spouses testified to the problems in everyday life that result from plaintiffs' hearing loss. Both plaintiffs testified that such hearing loss greatly interfered with their ability to communicate with family members, friends and others. Both testified that it had deprived them of the ability to appreciate plays, music and other recreation. Plaintiffs and their doctor testified that their hearing disability made it extremely uncomfortable for them to work around marine diesel engines. Other testimony established that modern marine engines commonly used in boats similar to those worked on by plaintiffs are generally diesels. Plaintiffs also provided evidence that was uncontroverted establishing the extent of their economic harm. Considering all of the evidence produced, none of which was rebutted by defendants, the court must conclude that the verdict was fully supported by the evidence.

Four, the occupational disability issue. Defendant's final contention is that there is no Jones Act (T. 12) liability for occupational diseases or disability. The court notes at the outset that the jury found both Jones Act liability and

unseaworthiness liability, thus even assuming the correctness of defendant's position, which the Court does not, success on this point would not result in a new trial or a substantive change in the outcome of this trial. As indicated, however, the Court is of the opinion that the Jones Act does apply to occupational disabilities. The Jones Act, 46 U.S.C. Section 688, provides that "Any seaman who shall suffer personal injury in the course of his employment may at his election maintain an action for damages at law with a right of trial by jury and in such action all statutes of the United States modifying or extending the Common Law right or remedy in cases of personal injury to railway employees shall apply." The historical note in United States Code Annotated Notes that the Phrase "Beginning Statutes of the United States" is a reference to the Federal Employers Liability Act, 45 U.S.C. Section 51, et seq.

The United States Supreme Court in *Urie v. Thompson*, 337 U.S. 163, (1949), and the Fourth Circuit Court of Appeals in *Young v. Clinchfield Railroad Company*, 288 F.2d 499, (4th Cir. 1961), found liability for occupational disease claims, silicosis in both claims, made under the F.E.L.A. similarly, in *Froust v. Coating Specialists, Inc.*, 364 F. Supp. 1154, (E.D. La. 1973), affirmed 494 F.2d 1352, (5th Cir. (T. 13) 1974), the court found that a vessel owner was liable under the Jones Act for an occupational disability, also silicosis, even though that Court allowed the vessel owner's insurers to escape liability because of policy clauses providing an exception for occupational disability.

The single authority defendants cite to the contrary is *Dalton v. American President Lines*, 339 F. Supp. 821. Although the Court has the highest respect for Judge Hoffman, the author of that Opinion, the Court feels that his decision is against the weight of authority. The clear language of the Jones Act and the Decisions of the Supreme Court and the Fourth Circuit cited above require that the Court find liability under the Jones Act for occupational disease.

Defendants also advance the argument that the Jones Act was not intended to be applied to the City, since its purpose is to protect interstate commerce. Defendants argue that since the fireboats were not engaged in interstate commerce, Congress had no power to make laws applying to the City as operator of the fireboats. This argument fails for several reasons. First, the Supreme Court has already established that municipalities are liable under General Maritime Law for damages incurred aboard fireboats in the case of *Workman v. Mayor of New York*, 179 U.S. 552, (1900). Second, there is little question that the fireboats have some relation to interstate commerce, notwithstanding the fact that they do (T. 14) not leave Maryland. Third, under the necessary and proper clause and the third article of the Constitution, Congress can impliedly make laws affecting admiralty.

Accordingly, for all of the reasons stated in this Bench Opinion, the Court denies defendant's motion for post-trial relief.

Do counsel have any objection if the court endorses that ruling on the margin of the motion?

(Mr. Berkman) No, Your Honor.

(Mr. Eberhardt) No, Sir.

(The Court) Thank you, gentlemen.

(Thereupon, at 6 p.m., the proceedings were concluded.)

United States Court of Appeals
For the First Circuit

No. 79-1115

Nuno J. DoCarmo, etc.,
Plaintiff, Appellant,

v.

F.V. Pilgrim I. Corp.,
Defendant, Appellee.

Appeal from the United States District Court
For The District of Massachusetts
(Hon. A. David Mazzone, U.S. District Judge, Campbell, Circuit Judge, and Wyzanski, Senior District Judge.*

Ronald B. Horvitz, with whom Morris D. Katz, and Katz and Horvitz were on brief, for appellant.
Thomas E. Clinton, with whom Astrid C. Glynn, and Glynn & Dempsey were on brief, for appellee.

December 28, 1979

Campbell, Circuit Judge. Nuno J. DoCarmo, Jr., a seaman and member of the crew of the F/V Pilgrim I, was injured in the course of his employment on that vessel. The accident occurred on the high seas, more than a marine league from the nearest shore. DoCarmo was transported by Coast Guard helicopter to Cape Cod Hospital in Hyannis, Massachusetts, where he was pronounced dead on arrival.

* Of the District of Massachusetts, sitting by designation.

Appellant brought this action as administrator of the deceased's estate for the benefit both of the estate and the deceased's father, mother, and brother. The five count complaint was framed in terms of the Jones Act, 46 U.S.C. § 688, the Death on the High Seas Act (DOHSA), 46 U.S.C. § 761 *et seq.*; and general admiralty and maritime law. Appellant has focused his appeal on questions arising under the Jones Act count. Both negligence and unseaworthiness were alleged as causes of the injury and subsequent death of Do Carmo, and the jury, in answer to special interrogatories found liability based on both those theories. Responsing, however, to further interrogatories, the jury determined that no recoverable damages had been sustained. In requesting that this court remand the case for a further hearing on the issue of damages, appellant emphasizes in particular the contention, rejected by the district court, that damages for loss of society, including companionship, love and affection, are properly recoverable under the Jones Act in an action brought by the survivors of a seaman wrongfully killed on the high seas.[1]

[1] The Jones Act provides

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

46 U.S.C. § 688.

The defendant-appellee filed at trial a motion in limine which requested that the district court instruct the plaintiff-appellant "not to refer in any way to damages for loss of consortium or

The Jones Act, unlike DOHSA,[2] does not specifically limit recoverable damages to those of a pecuniary nature. The Act does, however, incorporate by reference the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, the statute providing compensation for the injury or death of railway workers. Although FELA likewise contains no explicit language limiting an award to pecuniary loss, that statute has from an early time been uniformly interpreted to thus restrict the damages recoverable. *Michigan Central R.R. v. Vreeland*, 227 U.S. 59 (1913); *see also* cases cited in *Ivy v. Security Barge Lines, Inc.*, No. 76-4130, slip op. at 1058-59 n.4 (5th Cir. Nov. 13, 1979) (en banc). Drawing on the limited recovery available under FELA and that statute's incorporation into the Jones Act, courts have also consistently confined Jones Act damage awards to pecuniary loss. *E.g., Cleveland Tankers v. Tierney*, 169 F.2d 622 (6th Cir. 1948); *Igneri v. Cie de Transports Oceaniques*, 323 F.2d 257 (2d Cir. 1963), *cert. denied*, 376 U.S. 949 (1964); *see also* cases cited in *Ivy, supra*, slip op. at 1059 n.5. Most recently, the Fifth Circuit, sitting en banc, thoroughly reviewed the relevant authority in considering whether current developments in maritime law warrant a departure from this established rule. The court concluded that the Jones Act "does not permit the recovery in a wrongful death action of damages for loss of society of a seaman." *Ivy v. Security Barge Lines, Inc.*, No. 76-4130, slip op. at 1062 (5th Cir. Nov. 13, 1979) (en banc). While we would place less reliance than did that

nonpecuniary damages." The court granted the motion expressing its belief that under *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), such damages were not recoverable in "a Death-on-the-High-Seas-Act case, despite the fact that the case is also brought under the Jones Act."

[2] The Death-on-the-High-Seas-Act provides, in relevant part:

> "The recovery in such suit shall be a fair and just compensation for *the pecuniary loss* sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative suit is brought."

46 U.S.C. § 762. (Emphasis added.)

court on the Supreme Court's recent pronouncement in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) (holding that DOHSA's exlcusion of non-pecuniary damages precludes the awarding of such damages under general maritime law in a death action arising on the high seas), we entirely agree with the thrust of Judge Rubin's analysis, and hold that in an action for wrongful death on the high seas premised on the Jones Act, the deceased seaman's survivors are limited to recovering damages of a pecuniary nature.[3] We thus find no error in the district court's rulings and jury instructions so limiting damages.

Appellant raises several other issues which may be dealt with rather briefly. Appellant charges that the jury's failure, after finding liability, to award any damages "creates an anomaly." We disagree. The jury was entitled to find on the conflicting evidence before it that Do Carmo's family had suffered no pecuniary loss as a result of the seaman's death — that based on past practices, he likely would have contributed little or nothing to his family in the future.[4]

Appellant argues further that the parents of a deceased seaman need not establish their dependency on the decedent in order to recover damages under the Jones Act.[5] Assuming this to be the law, *see Cleveland Tankers v.*

[3] We think that arguments concerning any injustice alleged to be perpetrated by this rule should properly be addressed to Congress. The Supreme Court limited FELA damages to pecuniary losses in 1913, *Vreeland, supra.* Congress enacted the relevant portion of the Jones Act in 1920. The Merchant Marine Act of 1920, § 33, 41 Stat. 1007. Therefore, Congress must have been conscious that it was adopting this limitation when it explicitly incorporated by reference the FELA compensation scheme.

[4] The jury found that DoCarmo had not suffered damages for conscious pain and suffering. This finding was not unreasonable based on the evidence presented.

[5] The relevant section of FELA, incorporated into the Jones Act, states:

> "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is

Tierney, supra, 619 F.2d at 624, the fact remains that the jury was never instructed to the contrary. Had appellant believed the district court's instructions limiting recovery to pecuniary damages somehow emplied that a finding of dependency was required (although we are unable to discover any such implication), he should have made the point by way of objection to the charge. Fed. R. Civ. P. 51. He cannot raise the contention for the first time here.

The jury received special interrogatories requesting "yes" or "no" answers to questions concerning negligence, seaworthiness, contributory negligence, damages and prejudgment interest. Sometime after the jury retired to deliberate, it asked the court to clarify a point on the issue of prejudgment interest.[6] The record does not indicate any response, but appellee tells us that after consulting with

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employed by such carrier . . . or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . ."

45 U.S.C. § 51.

[6] The special interrogatories were:

"(1) Was the injury and subsequent death of the decedent due to the negligence of the shipowner?

(2) Was the injury and subsequent death of the decedent due to the unseaworthiness of the vessel or any of its equipment?

(3) If so, what are the damages to the decedent's:

(a) Father and Mother

(b) Brother

(4) What is the amount of damages the jury awards for conscious pain and suffering?

(5) Was the decedent contributorily negligent?

(6) If your answer to question (5) is yes, state what percentage of the total cause of the accident is attributable to the contributory negligence of the decedent.

(7) Does the jury award prejudgment interest?

The question posed by the jury was as follows:

"Your Honor,

both counsel, the court did supply some kind of an answer. No question as to that procedure is, in any event, before us. Following receipt of the unfavorable verdict on the issue of damages, appellant moved that the district court grant a new trial, arguing among various reasons, that the "failure to make an award of damages in this action after the jury asked a question concerning the applicability of prejudgment interest to any awards they were to make is a patent demonstration that the jury did not understand its function in this case." This motion for new trial was denied; appellant now again voices his contention of jury confusion in arguing that the district court's denial of the motion was incorrect. While the jury's question may indicate some degree of uncertainty on the part of one or more jurors on the issues of prejudgment interest and the potential sources of a damages award, this does not necessarily indicate any similar uncertainty regarding the ultimate finding that no damages were sustained. That the jury might have been considering an award at the time it posed the question on interest reveals little, and is in any case beyond the scope of a court's inquiry. *See* Fed. R. Evid. 606(b). The district court was well within its discretion in refusing to grant a new trial. *See* 6A Moore's Federal Practice ¶ 59.15[3].

Appellant also challenges an evidentiary ruling by the district court. Appellee, during the presentation of his case called Officer Robert D. Hobson who testified as to a statement made by DoCarmo's father concerning his son's whereabouts during 1973. This evidence was received, after a lengthy bench conference, specifically as a prior inconsistent statement in order to impeach the father who, while testifying, had made a statement contrary to that offered by Hobson. At the close of appellee's case, appellant proposed to put in some so-called rebuttal evidence to negate the impact of Hobson's testimony. This purported

Pertaining to question 7, does it apply to question three (3) and four (4) only, or does it also apply to any money coming from the Jones Act, High Seas Act, or whatever?

Jurors"

rebuttal, however, did not go to the question of the father's consistency as a witness, but rather went to the substantive issue of DoCarmo's whereabouts. Appellant had a chance to offer this evidence during the presentation of his case in chief; we find neither abuse of discretion nor reversible error in the court's unwillingness to permit appellant to reopen his case so as to allow that evidence, disguised as rebuttal testimony to come in. *See* Fed. R. Evid. 403.

The judgment of the district court is affirmed.

Supreme Court, U. S.
FILED
JUL 3 1980
MICHAEL RODAK, JR., CLERK

NO. 79-1906

In The
Supreme Court of the United States

October Term, 1979

MAYOR AND CITY COUNCIL OF BALTIMORE
Petitioner

v.

WARREN O. BARGER AND MARION IWANCIO,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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NO. 79-1906

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

MAYOR AND CITY COUNCIL OF BALTIMORE,

Petitioner

v.

WARREN O. BARGER AND MARION IWANCIO,

Respondents

ON PETITION FOR A
WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. In actions brought under both the Jones Act and General Maritime Law, were the District Court's instructions, and the Jury's awards of non-pecuniary damages, to two seamen who were injured due to the uncontested negligence

of the shipowner and unseaworthiness of its vessels, in accordance with firmly established law?

2. Was the Court of Appeals correct in ruling that the District Court's erroneous instruction concerning negligence per se was harmless error, and did this ruling create a conflict in the circuits?

3. Did the Petitioner waive its right to assert an alleged error in the lower court's instructions to the Jury in regard to the measure of damages and negligence per se, due to its failure to object to those instructions?

4. Should Respondents be awarded attorneys' fees because of the totally frivolous nature of the Petition and the consequent unjust delay in the recovery rightfully due them?

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STATEMENT OF THE CASE

The Respondents (the seamen) in this case, Warren O. Barger (Barger) and Marion Iwancio (Iwancio), were employed by Petitioner, the City of Baltimore (hereinafter referred to as the "City") as marine engineers in the Marine Division of the Baltimore City Fire Department (A. 68, 139). Both Barger and Iwancio worked as members of the crew of various fireboats owned, operated and controlled by the City (A. 139, 186) and sustained permanent hearing losses due to their exposure to extraordinarily high noise levels in the engine rooms of the City's vessels. The City stipulated and in fact admitted that Barger and Iwancio were seamen and entitled to all remedies applicable to seamen under federal law (A. 259,* Appellant's Brief on Appeal, p. 7).

Suit was instituted by the seamen against the City for recovery of damages under the provisions of the Jones Act (46 U.S.C. Sec. 688) and the general maritime law of seaworthiness. A jury trial was held before the Honorable Herbert F. Murray, United States District Judge.

As members of the crew of the City's fireboats, Barger and Iwancio were ordered and required to work in the

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* References are to the pages of the printed Joint Appendix filed with the Court of Appeals.

engine rooms of its vessels for over 20 years (A. 137, T. 187-190). Initially, and prior to 1956, the City owned steam powered fireboats. In 1956 and later in 1960 it purchased several diesel powered fireboats (A. 139, T. 263). The noise levels generated in the engine rooms of these diesel powered boats were tremendously loud and Barger and Iwancio were continuously exposed to the noise levels in these vessels for over 15 years (A. 140). From the first day these vessels were introduced into service, crew members of these vessels complained about the nature and extent of the engine room noise levels. (A. 140). The complaints were not only oral (T. 264-267),* but were written and included union grievances (T. 266, T. 59-61, Pl. Ex. 1). The complaints about the noise levels continued for 15 years before any action was taken to lessen the effect of the noise on engine room personnel (T. 64, T. 267-270, T. 357).

Despite the complaints about the noise levels the City failed to test the engine room noise levels to determine if the noise levels were hazardous or dangerous (T. 405-406), or to test any engine room personnel to determine if they were suffering impaired hearing (A. 406). The City also failed either to institute any hearing conservation program, or to determine if any engineering improvements could be made to lessen the noise level, or the effect upon the engineers who were exposed to the noise levels (T. 266-269).

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* "T" refers to pages in the Transcript of Proceedings before the District Court.

In April, 1971, the City, for the first time, provided two sets of noise suppressors to the engine room of its vessels (T. 196). The City did not require its engineers to wear the noise suppressors, and did not promulgate or enforce any rules or regulations for the wearing of same (T. 197). Even after introducing the noise suppressors, the City failed to test the noise levels in the engine rooms, failed to test the engine room personnel to determine if they sustained any hearing loss, and did not institute any hearing conservation program (T. 196-198).

Prior to trial the seamen retained the services of an expert in the field of noise exposure and noise control to conduct tests and measure the noise levels created by the engine room machinery of the City's fireboats. This expert testified to the significance of these noise levels, which were dangerously high and likely to cause serious and permanent hearing loss unless proper precautions were taken (A. 346, 347, 172-180). The expert testimony further revealed that the decibel noise levels exceeded OSHA acceptable decibel noise level limits for employees subjected to excessive noise levels without using proper noise suppression devices. (A. 179-180). The expert further stated that where noise levels were excessive it was the industry-wide practice and custom to test the environment, evaluate the employee's hearing and institute a hearing conservation program (A. 178-180, 183-184). Moreover, the expert explained that where decibel noise levels were excessive, it

was the accepted industry-wide practice to employ the use of noise suppression devices. (A. 182-184). The City called two (2) witnesses on this issue. Both witnesses testified, that the engine rooms of the City's fireboats were generating dangerously high noise levels which were causing hearing losses to engine room personnel (Pl. Ex. 21, Def. Ex. 2).

The seamen further produced uncontradicted medical testimony that as a result of their exposure to the noise levels on the fireboats they had sustained bilateral neurosensory hearing losses (A. 106-107, 113-114, 243). The medical testimony further revealed that Barger's and Iwancio's hearing loss was of a permanent nature and could not be corrected by any operative procedure (A. 107-108, 115, 243-244). Further, the expert testimony revealed a significant danger of aggravating and/or exascerbating their hearing losses if they were to return to duty in the engine room and be exposed to those noise levels or similar noise levels (A. 109, 115, 245). Significantly, the City introduced no medical testimony to contradict or impeach these findings.

In addition to the presentation of evidence by the seamen's expert as to the economic loss each of them sustained, evidence was introduced as to the non-pecuniary elements of damages sustained by them. The mental anguish, the suffering, the embarrassment and humiliation of having sustained a significant degree of hearing loss, (A. 84-88, T. 367-372),

the effect that such loss had on social, recreational and familial activities (A. 226-231, 232-238), and the likelihood of such damage continuing into the future were all factors presented to the Jury without objection.

The trial judge, with the agreement of counsel, submitted five alternative theories of liability under the Jones Act and three theories under the general admiralty law of seaworthiness to the jury (A. 313). Included in this charge, was the instruction that violation of the OSHA standards constituted negligence per se under the Jones Act and rendered the vessels in question unseaworthy (A. 313). The City did not object to this instruction, and in fact, the Fourth Circuit found that the City expressly agreed to the District Judge's proposed instructions before he presented them to the Jury (Petitioner's Brief, p. 5a). The court further instructed the jury that it may consider the seamen's physical pain, mental suffering, discomfort, embarrassment, anguish, humiliation, and the diminution in their capacity to enjoy life for the past and future in addition to pecuniary loss (A. 319). The City also failed to object to this instruction in the district court or in its brief on appeal to the Fourth Circuit.

The jury rendered a verdict in favor of Barger and against the City in the amount of $153,000 and in favor of Iwancio and against the City in the amount of $112,500, on special issues, finding the City negligent and its vessels unseaworthy. The Court denied

the City's Motion for Judgment N.O.V. and/or for a new trial. The City filed an appeal with the United States Court of Appeals for the Fourth Circuit.

The Court of Appeals ruled that the OSHA regulations do not apply to Jones Act seamen, and therefore, the jury instruction that a violation of an OSHA regulation constituted negligence per se was erroneously given. 616 F.2d 730, 733. The Court, nevertheless, concluded that, based on the particular facts involved in this case and the expert testimony adduced at trial, said erroneous instruction constituted harmless error, and thus, refused to reverse the jury verdict and did not remand the case for a new trial. 616 F.2d at 733-34. The Fourth Circuit also concluded that the verdicts were not excessive and that the District Judge did not abuse his discretion in refusing to reduce the damage awards. 616 F.2d at 734. Finally, the City's argument that non-pecuniary damages were not properly recoverable in a Jones Act personal injury case, which was asserted for the first time in oral argument before the Court of Appeals, was found by the Fourth Circuit to be "totally inapposite." 616 F.2d at 734, n. 7.

The City has petitioned this Court to grant a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

REASONS FOR DENYING THE PETITION

I.

IN ACTIONS BROUGHT UNDER BOTH THE JONES ACT AND GENERAL MARITIME LAW, THE DISTRICT COURT'S INSTRUCTIONS AND THE JURY'S AWARDS OF NON-PECUNIARY DAMAGES TO SEAMEN WHO WERE INJURED AS A RESULT OF THE UNCONTESTED NEGLIGENCE OF PETITIONER AND THE UNSEAWORTHINESS OF ITS VESSELS, WERE PROPER AND CONSISTENT WITH FIRMLY ESTABLISTED LAW.

At trial, the Honorable Herbert F. Murray, Judge of the United States District Court for the District of Maryland, properly instructed the jury that it could consider non-pecuniary, in addition to pecuniary elements of damages in determining a reasonable award to Respondents. In describing "non-pecuniary" elements of damages, Judge Murray instructed the Jury:

> "You are to consider the physical pain and mental suffering and the discomfort which they have endured in the past by reason of these injuries. You are to consider the physical pain and mental discomfort to which they may be subjected in the future. You are to consider the embarrassment, anguish and humiliation to which the plaintiffs have been subjected and may be subjected in the future as a result of any hearing loss. You are to consider the extent to which the plaintiffs' capacity

> for enjoyment of life has been damaged and is likely to be damaged in the future.
>
> After consideration of all of these elements of damage, you should award such sum of money as will adequately, fairly and fully compensate the plaintiffs for all of their injuries, losses, and damages." (A. 319).

The City never objected to this instruction. The jury, finding the City negligent and its vessels unseaworthy, awarded Iwancio $112,500 in damages; Barger was awarded $153,000 in damages.

Despite the City's failure both to object to this charge at the time it was presented to the jury, and to raise this issue in its brief to the Fourth Circuit,[1] it now asserts that Judge Murray's instruction was improper. Respondent contends that the City has clearly waived any right to assert error in the instruction. Rule 51, F.R.C.P., Rule 28(a)(4), F.R.A.P.

The City contends that this case presents a novel question for review because a triad of admiralty cases decided by this Court during the past decade,[2] which are allegedly in conflict

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[1] The first time the City raised this issue concerning the appropriateness of Judge Murray's instruction on the recovery of non-pecuniary damages was in oral argument before the Court of Appeals.

[2] Moragne v. States Marine Lines, 398 U.S. 375 (1970) (hereinafter referred to as "Moragne"); Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 rehearing denied 415 U.S. 986 (1974) (hereinafter referred to as "Gaudet"); Mobil Oil Corporation

with the established principles of recoverable damages in Jones Act cases. A review and analysis of the relevant case law in this area, however, clearly reveals that the City's argument in this respect is completely invalid, incorrect and frivolous. It further indicates a total failure on the part of the City to properly read and understand the Jones Act and general maritime law, and cases decided thereunder for over fifty (50) years which have permitted the recovery of the very same elements of damage awarded by the Jury in this case. This is elementary and universally understood and accepted maritime law. It is for this reason that Respondents are asking this Court to impose the sanctions of fees and costs on the City as authorized by 28 U.S.C. Sec. 1912 and Rule 49, U.S. Supreme Court Rules.

First, each and every case cited by the City, including the Moragne-Gaudet-Mobil Oil triad, involves an action for the death of a seaman or longshoreman. The instant case, in contrast, is not a death action brought by the survivors of a decedent seaman. Rather, it is an action initiated by the injured seamen themselves, seeking pecuniary and non-pecuniary damages for personal injuries sustained during the course of their employment. As the discussion below will reveal, the courts have consistently treated damage claims in personal injury cases differently than such claims in death cases, permitting recovery for non-pecuniary losses in the former, but denying such recovery in the latter, except for conscious pain and suffering.

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[2] (cont'd.) v. Higginbotham, 436 U.S. 618 (1978) (hereinafter referred to as "Mobil Oil") and sometimes hereinafter referred to as the Moragne-Gaudet-Mobil Oil triad.

The Jones Act, by its express terms, incorporates the Federal Employers' Liability Act (F.E.L.A.), 45 U.S.C. §51, et seq, and provides the following:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply...." 46 U.S.C. §688

Thus, in determining the propriety of particular elements of damages in both seaman death cases and personal injury cases, courts must first scrutinize the developed and established body of law regarding such damages under the F.E.L.A.

(a) Death Cases.

Beginning with this Court's decision in Michigan Central Railroad Co. v. Vreeland, 227 U.S. 59 (1913), (hereinafter referred to as "Vreeland") death cases under F.E.L.A. have limited recovery by survivors of the decedent railway employee to damages that "flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries". 227 U.S. at 70. Losses which result from the deprivation of society and companionship are excluded, as well as recovery by the

survivors for the decedent's pain and suffering, prior to his death. Nevertheless, the courts have consistently held that the decedent, prior to his death, may maintain his own action under the F.E.L.A. for pain and suffering and other non-pecuniary damages. Vreeland, 227 U.S. at 66. See also Oliver v. Seaboard Air Line Railway, 250 F. 652 (S.D.Ga. 1918), rev'd on other grounds 261 F. 1 (5th Cir. 1919).

This principle of limiting recovery in F.E.L.A. death cases to pecuniary loss "has uniformly been adopted with respect to Jones Act death actions." Ivy v. Security Barge Lines, Inc., 606 F.2d 524, 526 (5th Cir. 1979) U.S. appeal pending, (emphasis added) (hereinafter referred to as "Ivy"). The Ivy decision, in footnotes 4 and 5 thereof, provides an exhaustive list of death cases under both F.E.L.A. and the Jones Act, respectively, where recovery has been limited to pecuniary loss. 606 F.2d at 526. The City, in failing to recognize and understand the different damage principles applied by the courts in F.E.L.A. and Jones Act death actions as opposed to personal injury actions, relies on the Ivy decision and the cases cited in footnote 5 thereof for the proposition that pecuniary losses are the sole remedy available in any and all Jones Act cases. However, as the clearly established law discussed below reveals, the City's contention is totally wrong and the advancement of such a proposition in this Court overlooks a whole body of law and is frivolous.

(b) Personal Injury Cases

This Court, as well as the lower federal and state courts, has held that a railway employee, injured during the course of his employment, is entitled to recover "non-pecuniary" damages as early as in Chesapeake & Ohio Railway Company v. Carnahan, 241 U.S. 241 (1916) (hereinafter referred to as "Carnahan"). In Carnahan, a trial court's charge instructing the jury that it "may take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future" in assessing damages in a F.E.L.A. personal injury action was affirmed by this Court. 241 U.S. at 243 (emphasis added). Similarly, recovery has been permitted for the following "non-pecuniary" damages under the F.E.L.A.: pain and suffering, See Mileski v. Long Island Rail Road Company, 499 F.2d 1169 (2nd Cir. 1974); Dagnello v. Long Island Rail Road Company, 289 F.2d 797 (2nd Cir. 1961); Oliver v. Seaboard Air Line Railway, 250 F.652 (S.D.Ga. 1918), rev'd on other grounds,261 F. 1 (5th Cir. 1919); mental distress, fright, anguish and humiliation, See Bullard v. Central Vermont Railway, Inc., 565 F.2d 193 (1st Cir. 1977); Hayes v. New York Central Railroad Co., 311 F.2d 198 (2nd Cir. 1962).

In accordance with the provisions set forth above, the courts have applied this principle of awarding "non-pecuniary" damages under the F.E.L.A., to actions under the Jones Act in cases involving personal injuries.

Therefore, it has become well settled and firmly established law that an injured seaman may recover "non-pecuniary" damages, in addition to pecuniary damages, in both Jones Act and general maritime causes of action. The circuits have uniformly adhered to this principle. Stevens v. Seacoast Company, Inc., 414 F.2d 1032 (5th Cir. 1969); Downie v. United States Lines Co., 359 F.2d 344 (3rd Cir.), cert. denied, 385 U.S. 897 (1966); Blanco v. Phoenix Compania De Navegacion, S.A., 304 F.2d 13 (4th Cir. 1962); Imperial Oil, Ltd. v. Drlik, 234 F.2d 4 (6th Cir.), cert. denied, 352 U.S. 941 (1956).

In defining the scope of "non-pecuniary" damages in admiralty actions the courts have held that it encompasses the following: (1) physical pain and suffering, See Imperial Oil, Ltd. v. Drlik, 234 F.2d at 10-11 (6th Cir. 1956); (2) mental anguish, humiliation and embarrassment, See Blanco v. Phoenix Compania De Navegacion, S.A., 304 F.2d at 16 (4th Cir. 1962); (3) loss of pleasure and ability to engage in those activities which contribute to the normal enjoyment of life, See Downie v. United States Lines Co., 359 F.2d at 347-348 (3rd Cir. 1966) where the Court explained that examples of elements that enter into an award of damages under this rule include "inability to dance, bowl, swim or engage in similar recreational activities; inability to perform customary household chores; and inability to engage in the usual family activities." 359 F.2d at 347 n.3. Moreover, such "non-pecuniary" damages may be awarded for past (commencing with the time of the injury), and future physical and mental effects of the

injury, based on life expectancy at the time of the injury. Downie v. United States Lines Co., 359 F.2d at 347.

Judge Murray's instruction in this case carefully and clearly set forth each of the non-pecuniary elements of damages which, as explained above, the courts have held to be appropriate for jury consideration - past and future physical pain, mental suffering, anguish, embarrassment, humiliation and the extent to which the capacity for enjoyment of life has been damaged. The court did not go beyond these well established principles and did not instruct the jury to consider any other non-pecuniary damages. Furthermore, the elements of properly recoverable damages contained in the trial court's charge in this matter, are almost identical to those elements of damages listed in the sample jury instructions, supplied by the Honorable Alvin B. Rubin, then Judge of the United States District Court for the Eastern District of Louisiana,[3] to Benedict on Admiralty, the established treatise in maritime law. See 1B Benedict on Admiralty §32, Form 32-1 (7th Ed. 1979). (Appendix A)

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[3] Now Associate Judge of the United States Court of Appeals for the Fifth Circuit.

(c) No Uncertainty or Conflict Exists Among the Circuits.

Rule 17 of the Supreme Court Rules provides that:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor....
>
> "(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last record; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

The City, in urging this Court to issue a writ, wrongly states that the Moragne-Gaudet-Mobil Oil triad has caused confusion and uncertainty regarding the appropriateness of non-pecuniary damages in Jones Act cases, and, consequently, has created a conflict among the circuits. This contention is without merit for two reasons. First, the Moragne-Gaudet-Mobil Oil triad concerns the applicability of damages in death cases under general

maritime law, the Death on the High Seas Act, 46 U.S.C. §761 (DOHSA), and the Jones Act. As explained above, the instant dispute involved a personal injury claim, not a death claim, and the courts have continually treated these actions differently. Accordingly, the applicability of those cases is totally irrelevant to the case at bar. Second, the triad decisions are consistent with each other, and the City has failed to establish that a conflict among the circuits exists.

Respondents respectfully submit that the City's argument and contention that "...the law relative to this issue is conflicting and uncertain" (Petition p. 9), is entirely unintelligible, completely disregards fifty years of existing precedent and is totally frivolous.

II.

THE COURT OF APPEALS WAS CORRECT IN RULING THAT THE DISTRICT COURT'S ERRONEOUS INSTRUCTION CONCERNING NEGLIGENCE PER SE WAS HARMLESS ERROR, AND DID NOT CREATE A CONFLICT IN THE CIRCUITS.

In the charge concerning both the Jones Act and general maritime law, the District Court instructed the jury that the City had been subject to the regulations of the Occupational Safety & Health Act, 29 U.S.C. §651 et seq. (OSHA), 29 CFR Chapter XVIII, since 1971, and that if the City failed to comply with OSHA noise regulations in the operation of its fireboats, it would be guilty of negli-

gence per se. (A. 309-310) The City failed to object to this instruction during the trial of this case and the Fourth Circuit found that the City had expressly agreed to the District Judge's proposed instructions before he presented them to the Jury (A. 284).

Although the literal terms of Federal Rules of Civil Procedure 51 would prevent the City from raising this objection on appeal, the Court considered whether justice would be disserved by allowing the verdicts to remain undisturbed. Concluding that: (1) the OSHA regulations were largely a restatement of industry practice regarding employee exposure to noise, and therefore embodied a standard of care which might be applied to the City even in the absence of the regulations; (2) that the district court's instruction applied the regulation only during the period beginning in 1971, a small fraction of the time that the seamen worked on the fireboats; and (3) because both seamen sought medical treatment for their loss of hearing soon after 1971, indicating that their loss of hearing has been caused by noise exposure that took place over a long period prior to 1971, the Fourth Circuit held that the district court's charge to the jury amounted to harmless error, and the failure to correct said error would not result in a miscarriage of justice. 616 F.2d 734. This conclusion was proper and in accordance with established law.

The City contends that the Fourth Circuit decision in this case created a conflict in Circuits. This assertion is not supported by any case which demonstrates such a conflict.

The Fourth Circuit, consistent with the Fifth Circuit in National Marine Service, Inc. v. Gulf Oil Company, 433 F.Supp. 913 (E.D. La. 1977) aff'd, 608 F.2d 522 (5th Cir. 1979) and Clary v. Ocean Drilling and Exploration Company, 429 F.Supp. 905 (W.D.La. 1977) aff'd, 609 F.2d 1120 (5th Cir. 1980), concluded that OSHA regulations are inapplicable to the working conditions of seamen. The Fourth Circuit concluded in this case that the error was harmless based upon the particular facts of this case as noted above, 616 F.2d at 733-34. No conflict within the circuits has been shown to exist, and it is irresponsible for the City to contend that there is any such conflict.

Accordingly, since the Fourth Circuit properly interpreted and consistently applied the relevant law, no writ of certiorari should be issued in this matter since no conflict in circuits has been demonstrated.

III.

THE CITY WAIVED ITS RIGHT TO ASSERT AN ALLEGED ERROR IN THE LOWER COURT'S INSTRUCTIONS TO THE JURY IN REGARD TO THE MEASURE OF DAMAGES AND NEGLIGENCE PER SE INSTRUCTION.

Rule 51 of the Federal Rules of Civil Procedure provides, in part:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the

jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

As explained above, the City failed to object to both the instructions regarding the measure of damages and as to the applicability of the OSHA regulations. Moreover, the Fourth Circuit found that the City agreed with the instructions. 616 F.2d 733. As mandated by Rule 51, the City has waived its right to object to these instructions and the City's Petition must be dismissed.

The District Court followed the recommended practice of reviewing on the record with counsel for both sides, the proposed instructions (A. 256-287). During said conference, the City failed to object to the instruction regarding non-pecuniary damages and, in fact, noted its agreement with all of the instructions relating to damages (A. 270-271). At trial, neither an objection nor an exception was made with regard to said instruction. The City's brief filed with the Fourth Circuit, failed to raise this contention, and contained no argument that the non-pecuniary damage instruction was erroneous. In fact, the first time the City ever asserted this issue, was in its oral argument before the Fourth Circuit. 616 F.2d 734, n. 7.

Moreover, at the conference with the trial judge on the proposed jury instructions, Barger and Iwancio requested the court to instruct the jury that violation of the OSHA regulation dealing with

noise exposure would be negligence per se and would amount to unseaworthiness if the jury believed it was a proximate cause of the seamen's hearing loss (A. 275-277). At the conclusion of this "on the record" discussion the court indicated that it would consider such request and decide the question before the jury was brought in the next day (A. 281). The court did reconsider its instructions and granted the seamen's requested instruction (A. 282-287). When asked by the court if that instruction would be satisfactory with both sides, counsel for the City said "It is with the defense, Your Honor". (A. 284). The court then asked for any further exceptions as to the OSHA instructions (A. 285) to which the City made no reply. Again, at the conclusion of the entire thirty (30) page instruction to the jury, the court asked counsel if there were any exceptions to the charge and the City made only one exception to the charge which was unrelated to the OSHA instruction, and failed to except to the charge as it related to the OSHA instruction (A. 327-328).

As noted by the Fourth Circuit in Honea v. West Virginia Pulp and Paper Company, 380 F.2d 704, 708 (4th Cir. 1967), "The very purpose of the rule [Rule 51] is to give the trial judge the opportunity to correct any error brought to his attention before the case is submitted to the jury for decision." Therefore, Rule 51 and Supreme Court Rule 17 mandate that a Writ of Certiorari should not issue where the party requesting said writ has been dilatory in asserting its objections and preserving the record for judicial review.

IV.

RESPONDENTS SHOULD BE AWARDED ATTORNEYS FEES BECAUSE OF THE TOTALLY FRIVOLOUS NATURE OF THE CITY'S PETITION.

28 U.S.C. §1912 provides:

> "Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."

Under this section, courts are granted the authority to impose sanctions against parties who prosecute frivolous appeals. Emaldio v. Pocahontas Steamship Company, 355 F.2d 55 (4th Cir. 1966).

In Whitney v. Cook, 99 U.S. 607 (1879) this Court stated the following:

> "Our experience teaches that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages....[P]arties should not be subjected to the delay of proceedings for review in this court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked." 99 U.S. at 607.

See, e.g. Layton v. Selb Manufacturing Company, 359 F.2d 715, 717 (8th Cir.), and cases cited in note 6, cert. denied,

385 U.S. 929 (1966), rehearing denied 385 U.S. 1021 (1967); In Re Midland United Co., 141 F.2d 692 (3rd Cir. 1944); Wright v. Central National Bank, 37 F.2d 234, cert. denied, 281 U.S. 755 for examples of cases where the courts have awarded damages, including attorneys fees and other costs, for frivolous appeals. Furthermore, new U.S. Supreme Court Rules provide for the award of appropriate damages for frivolous Petitions for Writ of Certiorari. See Rule 49.2.

As each of the arguments presented above indicate, the case law pertaining to the issue raised by the City in its Petition is clear, well established and not open to dispute or confusion. The main thrust of the City's Petition ignores over fifty years of precedent and this alone justifies the imposition of damages. Moreover, the City has failed to properly preserve any of the alleged errors it now asserts by not properly adhering to the provisions of Rule 51 of the F.R.C.P. and Rule 28(a)(4) of the F.R.A.P. Finally, there is absolutely no demonstrated conflict or confusion among the circuits with regard to any of the issues that the City has requested this Court to review.

Barger and Iwancio however, having been unjustly injured by the delay, should be awarded damages, including attorneys fees and costs.

CONCLUSION

For all of the aforegoing reasons Respondents respectfully request that the Petition be denied, and that this Court award Respondents damages, including attorneys fees and costs.

Respectfully submitted,

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§ 32. Damages.[1]

FORM No. 32–1

Damages: Elements, Nature and Extent of Liability[2]

If you find that the defendant is liable in this case, you should assess as damages the amount you find justified by a preponderance of the evidence as full and just compensation for all of the plaintiff's damages, no more and no less. Damages are not allowed as a punishment against a party, and cannot be imposed or increased to penalize the defendant. Neither can damages be based on speculation for it is only actual damages—what the law calls compensatory damages—that are recoverable. On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury, tangible and intangible. They are an attempt to restore the plaintiff; that is, to make him whole or as he was immediately prior to his injury.

You should consider the following elements of damages to the extent you find them proved by a preponderance of the evidence, and no others: (1) physical pain and suffering including physical disability, impairment and inconvenience, and the effect of plaintiff's injuries upon the normal pursuits and pleasures of life; (2) mental anguish and anxiety including humiliation, shame and embarrassment, worry and concern, and feelings of economic insecurity caused by disability; (3) income loss in the past; (4) impairment of earning capacity or ability in the future, including impairment of normal progress in the plaintiff's earning capacity.

No evidence of the value of such intangible things as mental or physical pain and suffering has been nor need be introduced: for, in that respect, it is not value you are trying

[1] A substantive treatment of damages is reserved for a future release. For a discussion of damages in death cases see 2 *Benedict* § 86.

[2] Form adapted from charges supplied by Judge Alvin B. Rubin of the Eastern District of Louisiana.

to determine, but an amount that will fairly compensate the plaintiff for the damages he has suffered.

You are not to award damages for any injury or condition from which the plaintiff may have suffered, or may now be suffering, unless it has been established by a preponderance of the evidence in the case that such injury or condition was proximately caused by the accident in question.

In arriving at an amount of your verdict, you should also take into consideration the fact that all persons do not live to their age of life expectancy, and that their earnings may not remain stationary, but may vary, increase, diminish, or cease in the future from causes or infirmities in no way involved with the issues in this case.